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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NICKOLAS ANTHONY SALCIDO, Defendant and Appellant.	A097014 (Contra Costa County Super. Ct. No. 0006999)

Nickolas Anthony Salcido appeals his jury conviction for second degree murder. He contends the trial court erred by (1) denying his motion to sever an attempted murder charge involving a separate victim, (2) permitting the use of evidence regarding the other charge to show the shooting for which he was convicted was not accidental, (3) failing to instruct the jury sua sponte on the limited purpose for which that evidence was introduced, (4) denying his motion to dismiss the indictment, and (5) giving certain jury instructions in derrogation of his constitutional rights. Appellant also argues that he was deprived of a crucial defense witness, and that the prosecution committed misconduct in argument to the jury. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Murder Of Howard Taft*

A. *Prosecution Case*

Stephanie Mendez testified that on December 20, 1999, she was at her house in Novato with her friends Kelly Reeves, Tenny Purcell, Harold Taft (aka "Junior" or

"June"), Joe Garcia, and Garcia's friend Rick. At about 9:00 p.m., they drove to Applebee's restaurant in Vallejo, where they met defendant, his brother Jessie, and his girlfriend, Toni Dotson, in the parking lot. Defendant seemed to be sober. A few minutes later, all nine of them entered the restaurant. Mendez, Jessie and defendant all had something to drink. Defendant drank beer. Mendez did not recall Taft, Rick, Garcia or Dotson drinking. The whole group stayed in Applebee's about 45 minutes.

When Kelly said she had a headache the group decided to go to defendant's house to get an aspirin. They went outside to the parking lot and remained there for a few minutes as defendant and Rick were "rapping." There was no music, and defendant was rapping in a very violent way, making "rat-a-tat-tat, rat-a-tat-tat" gun sounds. Nobody smoked marijuana in the parking lot, although Garcia had smoked it earlier in the evening. The group got into their cars and went to Crockett at about 10:00 p.m.

When Mendez arrived, Taft's car was already parked in the driveway, next to another car. Taft was standing between the two cars with Purcell and Reeves. Mendez, Rick and Garcia stood by the garage and Jessie was inside the house. Defendant and his girlfriend were off to the right in the grass. None of them were drinking and defendant did not seem intoxicated.

As Mendez stood smoking, someone asked her to pass them the cigarettes. Defendant approached Garcia and asked, "What did you say?" Garcia said, "Nothing" and asked Rick if he had said anything. Defendant then grabbed Garcia by the neck and threw him up against the garage. Garcia pushed back, knocking defendant down. Mendez saw defendant grab something dark on the ground. She thought the object might have been a rock. She walked towards Taft, who was still standing between the cars. Mendez, Rick, Garcia and Reeves then ran to Reeves's car and left. As they drove away Mendez looked back and saw Taft trying to restrain defendant as the two of them stood between the cars. Taft's back was to Mendez and defendant was facing Taft.

According to Garcia's testimony, he went to Applebee's with Taft, Mendez, Rick, Purcell and Reeves, where they met Jessie, defendant and Dotson in the parking lot. Some of them smoked a joint, then went inside where they ate and drank. Defendant was

somewhat intoxicated but not "falling down drunk." He was not slurring his words or stumbling. When they went back outside, Rick and defendant rapped a little bit. Garcia noticed that defendant's rap was hostile and mentioned killing people. They went to defendant's home to get aspirin for Reeves. Garcia was uncomfortable about going there because he did not know defendant or his brother, and because the rapping had concerned him. Two cars were in the driveway when Garcia's group arrived.

They all stood around talking for 15 or 20 minutes and a joint circulated among them. Garcia was between the garage door and the two cars, along with Mendez, Rick and defendant. Taft was between the two cars in the driveway with Reeves and Purcell. Jessie was at the bottom of the front stairs and defendant's girlfriend was at the top of the stairs. When Rick asked Garcia for a cigarette, or vice versa, defendant "snapped on" Garcia. He came up to him and said, "What did you say?" Garcia said, "What's up?" Defendant paused, then pushed Garcia up against the garage door, holding one arm behind himself as if reaching for something. Garcia pushed defendant back as hard as he could, knocking him into the Cadillac and then onto the ground. Garcia heard what sounded like a gun falling, and saw a .38 caliber blue steel revolver on the ground. Garcia, Reeves, Mendez and Rick ran to Reeves' car, and Reeves drove away. Garcia recalled telling the police that defendant was "pretty drunk," ranking about four or five on a scale of ten. He testified, however, that defendant was not slurring his words or "falling down drunk."

Taft's cousin Tenny Purcell was 14 years old at the time of trial. He saw defendant drinking beer at Applebee's but did not recall seeing anyone drinking hard liquor. In the parking lot after everyone came out of Applebee's, Purcell saw defendant rapping. His voice was raised and emotional; he was getting "pumped up" and red in the face. Later, at the defendant's home, Purcell saw defendant and Garcia push each other near the garage door. Defendant fell, and picked up a black revolver that had also fallen on the ground. When Garcia ran, defendant tried to follow him, but Taft held him back and stood in his way as Reeves' car drove away. Defendant said something about "taking

shit in front of his house" and about shooting the car. Purcell saw the gun in defendant's hand as he tried to follow Garcia.

Defendant walked back between the two cars parked in the driveway. Taft, who was sitting in his car, said to defendant, "You didn't have to shoot him. You could just fight him." Taft told defendant he had not heard Garcia say anything. At that point Jessie came out of the house carrying a six-pack of beer and Purcell said to him, "You just missed it." Taft told Purcell to be quiet. He got out of his car and told defendant, "We are like cousins," and then challenged him to a fight.

Taft put his glasses and cell phone on the trunk of Jessie's Cadillac, the other car in the driveway. Defendant was still arguing with him as Taft walked to the front of the cars. They faced each other.

Defendant raised the gun and pointed it at Taft, and Jessie "smacked the gun away." Taft said, "You get that gun out of my face." Defendant replied, "You really thought I was going to do that? You really thought I was going to shoot you?" Defendant raised the gun again, and pointed it straight at Taft's face from a distance of six inches to a foot away. Taft's hands were at his sides with his palms open and facing appellant. Without hesitation, defendant pulled the trigger and shot Taft, who fell to the ground. Purcell saw and heard the gun go off. After the shooting, defendant had a "weird" look on his face as if he were shocked.[1]

Purcell initially hid behind a bush, then ran to the home of Taft's father, telling him Taft had been shot. When Purcell got home, he told his parents and relatives that defendant shot Taft. Defendant had not slurred his words, mumbled, or stumbled between the time Garcia knocked him down and the shooting. Purcell was 13 years old on the day of the shooting. He assumed defendant was drunk because he was not acting the way he normally did. He behaved as though he was mad at everybody, especially Garcia and Rick. Now that Purcell had more experience seeing adults drink, he believed

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1 Purcell denied that defendant had a "glazed" look on his face if that word meant, as defense counsel put it, dumbfounded, surprised, not looking, not seeing or petrified.

that defendant was more "buzzed" than drunk. Purcell had seen defendant frequently in the past and had slept over at the Salcido home approximately 15 times. Defendant acted differently at the restaurant, but not drunk. He had only had two or three beers during the 45 minutes they were all there.

Jane Bendall, a nurse, lived across the street from the Salcidos. She heard the sounds of an argument or fight and looked out a window. She saw four or five men yelling at each other, with one man doing most of the yelling. At the time, she thought his voice sounded African-American. Although she knew defendant and his brother Jessie by sight, she was not looking at the group outside to see if she could recognize anyone. In any event she was too far away, and they all were wearing bulky clothing. Some also wore hats.

Bendall went back to work on her computer. A few minutes later she heard a car leave and things quieted down a bit. Then she heard a gunshot, grabbed her portable phone and stood at her front door looking outside. A young man and woman came out of the house across the street, and walked down the porch steps to the sidewalk. Bendall yelled to them, "That was a gunshot." She may also have said, "Who's got a gun" or "What's going on here." The woman did not say anything, but the man said, "No. I think maybe it was a firecracker." When Bendall repeated that it was a gunshot, the man did not answer. The man was not unsteady or staggering as he walked and did not have to hold onto anything. He was wearing a cap and walking directly behind the woman. Bendall did not get a good look at him, or recognize him, during their brief encounter.

At that point the Salcidos' next-door neighbor, Patricia Holderby, came outside, walked to the car, and began talking to the young man. Bendall overheard their conversation. The man did not slur his speech and had no trouble speaking either then or earlier when he said he thought the sound was that of a firecracker. Nothing about him made Bendall think he might be intoxicated. Bendall saw the couple get into a car, and the young woman drove away. Bendall had not seen the car there before. She ran after it to try to get a license number, but she could not see it.

Bendall and Holderby became distracted when the Salcidos' dog came outside. They caught the dog and took it back to the house. Jessie came out of the house. As he led the dog to the backyard, he seemed normal. But when he looked over towards the garage he said, "Oh, my God, he's been shot." When Bendall saw a man lying on his side facing the Salcidos' garage, she called 9-1-1. The man had been shot in the face and was bleeding profusely. Bendall began administering CPR. She could not find a pulse, but the man was still breathing.

At Bendall's request, Jessie moved the Cadillac to make room for an ambulance. Bendall was not watching him do so but she heard a sound consistent with a car scraping the fence. Jessie was crying, and tried to help stop the bleeding with paper towels. He said things like "Don't die. Save my friend." He asked Bendall if she had seen who shot the man, and she replied that she had not. The young couple who had left seemed very calm to Bendall. Based on her 20 years as a nurse, she found their behavior unusual under the circumstances.

Patricia Holderby had lived next door to the Salcido family for eight years. Holderby knew Jessie and defendant by name. Defendant, who is taller and slimmer than his brother Jessie, had not lived in the house for the past few years, but Holderby had seen him there from time to time. Holderby heard the gunshot, which sounded like a firecracker. She also heard music and the sound of a car leaving. When she heard Bendall yelling, she went outside herself. She heard Bendall say, "I know that was a gunshot. What is going on?"

Holderby joined Bendall on the sidewalk, and saw defendant and a younger woman walk away from the driveway. Holderby walked up to defendant and touched him. She looked him in the face, and held him for a moment as she asked if he was okay. He was very scared and upset and said, "I've got to get out of here. This is just a bad scene. I've got to get out of here." He was not slurring his words or having trouble walking or getting into the car, nor did he smell of alcohol. He did not seem to have been drinking or to be intoxicated. The couple got in the car and the woman drove away, with Bendall chasing after them.

Bendall drew Holderby's attention to a person lying in the driveway. Holderby called her husband to come outside, and he assisted Bendall at the body. Jessie moved one of the cars in anticipation of the ambulance's arrival. He damaged part of his fence in doing so. Jessie seemed very upset, yelling, "Did you see what happened? Did you see who did this?" He acted like he did not know who shot the man.

Criminalist Richard Schorr arrived shortly after midnight. He photographed the scene and noticed a pair of eyeglasses and a cell phone lying on the trunk of the Cadillac. The victim had a bullet hole on the side of his nose. A powder burn around the wound indicated the shot had been fired from close range. Even without factoring in the caliber of the bullet, Schorr could tell that the victim was shot from less than a foot away. No shell casing was recovered, which indicated the bullet had been fired from a revolver. An uncocked revolver required 8 to 14 pounds to pull the trigger. A revolver with a hair trigger has been modified so the trigger pull is two pounds or less. Storr had never examined such a weapon, but estimated that out of every thousand revolvers examined in a crime laboratory perhaps two or three had hair triggers.

Ten days after the shooting, Sheriff's Deputy Michael Costa searched the residence of defendant's girlfriend Toni Dotson. He found a black nylon holster designed for a six-inch gun under Dotson's bed, as well as a newspaper article about the killing. Costa interviewed Purcell in San Francisco the day after the killing, and recorded the interview on audiotape. Purcell told Costa he had heard defendant yell, "Motherfuckers want to play games. Let's shoot the car, too." Purcell also said he believed defendant was drunk based on how he was moving and because he was drinking a lot of beer right up to the time of the shooting.

Criminalist Jason Kwast attended the autopsy. He took a bullet recovered from inside Taft's skull to the laboratory for analysis. Kwast described the bullet as a medium caliber unjacketed lead bullet. The autopsy surgeon, Dr. Josselson, testified that Taft sustained a single fatal gunshot wound to the head. The bullet entered on the left side of the nose and did not exit. Based on soot and stippling near the wound, Dr. Josselson estimated that the gun was between two and six inches from the victim's nose when it

was fired. A blood test showed Taft had an extremely low level of alcohol, and no drugs, in his system.

B. *Defense Case*

Jackie Pruess was living with Hal Taft, the victim's father, when Purcell came running up to their house to report the shooting. Purcell said, "Nick shot Junior." Pruess denied telling a neighbor that Purcell did not know whether Jessie or defendant shot Junior; Purcell "always knew" who shot Junior. When Pruess and a neighbor went inside with Purcell to tell Taft's father what had happened, Purcell said defendant held a gun up to Junior's face and shot him. Pruess never told anyone that it was Jessie rather than defendant who shot Junior. Although she used to confuse the two brothers, Purcell himself was never confused.

Sebohan Green, a friend and neighbor, called Pruess the next day to express her condolences. Pruess said Purcell had been so scared and confused when he arrived that night that Pruess could not understand what he was saying. Pruess asked Green whether Jessie or defendant had shot Junior. Pruess had not clarified whether or not she had spoken to Purcell. Green acknowledged that defendant's mother, Terri Salcido, was Green's best friend, and that she had attended the first day of the trial before being asked to testify by defense counsel. Green never spoke with Taft's father about the case, nor had she ever talked to Purcell. Green acknowledged that Pruess was a friend of defendant's sister Michelle, and would know the difference between defendant and Jessie.

Because Toni Dotson invoked the Fifth Amendment at trial, her preliminary hearing testimony was read to the jury. She was defendant's girlfriend and was present when Taft was shot. As Dotson smoked a cigarette near the Salcidos' front porch, she saw a lot of commotion involving the guys from Novato, defendant and Jessie. Defendant and one of "the guys" were pushing each other. Dotson did not see defendant fall and did not see a gun fall from his waistband. After a few minutes, the people from Novato ran to their car and left. Defendant and Taft were talking between the two parked cars and Jessie brought them beer. Dotson did not see defendant with a gun.

When Jessie came out with the beer, Dotson moved towards the end of the driveway because she wanted to go home. Her car was there, but she decided to wait for defendant. Hearing a gunshot, she dropped to the ground. When she stood, she saw defendant and Jessie talking by the front stairs of the house, and approached them. As she moved toward them, she noticed Taft's body on the ground. She asked defendant and Jessie what had happened but they did not answer. She did not see defendant with a gun. He said, "Come on, let's go," and they started walking to her car. As she was opening her car door, the neighbor lady from across the street asked defendant what had happened. Dotson did not recall hearing defendant's responses. He and Dotson then got in the car and left. Defendant never told her what had happened, but he was crying so she did not ask again.

Dotson had seen defendant and Taft together "a couple" of times, but never saw them argue, fight or threaten one another. Defendant never mentioned being angry with Taft; they seemed like good friends or cousins. Defendant seemed a little drunk before they arrived at Applebee's. He had drunk five or six beers at a friend's house and was not acting like himself. He drank five or six mixed drinks and some hard liquor at Applebee's. In the parking lot afterwards, he was very intoxicated, swaying off balance, and slurring his words. Jessie and Taft seemed drunk also. Defendant was just as intoxicated at the house as he had been in the parking lot. Dotson did not see a gun at any time that evening. She was unaware that a handgun holster was found under her bed; she had never seen it before.

Defendant testified that, about three months before the Taft shooting, defendant was shot at while he and three friends rode in a burgundy colored car. The color was similar to that claimed by the "14" gang. A blue car, the color claimed by the "13 gang," pulled up, and its occupants flashed the gang sign for the "13's." Then someone from that car shot at them before they managed to drive away.

After that incident, defendant learned that he and his brother had been "marked" for death by the "13's." He tried to obtain a handgun, and asked several friends to help him get one. He did not ask his brother, Jessie, knowing he would not approve. He even

asked Taft, whom he described as his best friend. Defendant assumed Taft forgot the request because he did not mention the subject again. A month later, defendant moved in with his girlfriend Toni Dotson in El Sobrante. He felt safe there and did not pursue the idea of getting a handgun. In November, however, Taft offered defendant a gun as the two of them were preparing to go to some clubs in San Francisco. Defendant did not accept the gun, and Taft did not want to take it with him to San Francisco. Accordingly, defendant stored the big, black revolver under Dotson's bed. Defendant got around to taking the gun out, to give back to Taft, on the day of the killing. Dotson was in the shower when he put the gun in his pocket, leaving the holster under the bed. He assumed the gun was loaded, but did not check or put the safety on.

Before going to Applebee's with Dotson, defendant bought a 12-pack of beer, drank five, then went to his family's home in Crockett. There he left the remaining seven beers inside the entryway. Feeling a little drunk, he stowed the gun under the passenger seat of Dotson's car. Taft was at Applebee's, and they greeted each other as best friends and cousins. At the restaurant, defendant drank beer, "all kinds" of mixed drinks and shots of hard liquor. Defendant assumed the 13-year-old Purcell drank alcohol as well. In the parking lot, appellant was "tore up" drunk and had to concentrate to stand and keep from stumbling. He was not feeling hostile, angry, or aggressive, however.

When the group left for his family home, he was in Dotson's car and she was driving. The gun was still under the seat. When they pulled up in the driveway, defendant retrieved the gun because he thought he would take it inside the house and return it to Taft when they were alone together. He did not want Dotson or Jessie to know about the gun, and he did not intend to fire it. Taft suggested that defendant and someone else start rapping in front of the house, so he did. He wanted to do a good job because he was competitive when it came to rapping, which was a serious hobby of his. When he finished, he thought he heard Garcia or Rick say, "smoke you like a cigarette," which he interpreted as a threat that someone was going to kill him. When defendant asked what they had said, Garcia came at him like he was going to hit him. Defendant pushed Garcia up against the garage, but Garcia bounced back, knocking defendant flat

on his back. He saw stars when his head hit the ground, and felt the gun fall from his pocket.

Everyone was running at that point. Defendant got up and started to run up the steps to his mother's house. About halfway up he realized that everybody was running the other direction. He stopped and saw the gun on the ground. He walked back, picked it up and put it in his pocket. Taft was trying to calm people down. Defendant started laughing at the fact that he had fallen so hard, but nobody else was laughing. Still feeling the effects of the alcohol, defendant walked toward Taft to "play with" and "antagonize" him. Defendant did not notice people leaving, and Taft did not try to prevent him from chasing them. Defendant said, "What, you got their back and not mine?" and started to laugh. By that he meant to jokingly say "you are choosing them over me." He did not mean it as a threat.

Instead of making Taft laugh, as defendant intended, the remark made Taft angry. He pushed defendant and said, "You're stupid. What's wrong with you?" Taft pushed him again, but defendant kept laughing. He did not have the gun in his hand. Taft pushed defendant one last time, knocking him into the railing by the steps. He did not fall and produced Taft's gun to return it. Holding it out barrel first, he said, "Here dude. Here's your shit back. I'm leaving." Taft pushed the gun away and said, "Get that shit out of my face." Defendant replied, "You didn't really think I was gonna shoot you?" Jessie had come out and said, "Don't be playing right now, you're drunk." Defendant put the gun back in his pocket, looked for his girlfriend, and said, "Let's go." Taft said, "Fuck that," and put his glasses and cell phone on the trunk of the car. Defendant pulled the gun out of his pocket again and tried to give it to Taft again because he wanted to leave. He did not interpret Taft's behavior as a challenge to fight. Defendant held the gun out again, this time with his finger on the trigger. The gun was pointed to the right of Taft and was not cocked. Taft grabbed defendant's hand, scaring him. Defendant snapped back and squeezed the trigger involuntarily. The gun went off, shooting Taft. Defendant did not intend to shoot him.

Defendant knelt down between the cars because he felt like he was going to be sick. The gun was on the ground. He started walking up the stairs and Jessie said, "You shot Junior." Defendant denied it. When he saw the blood on the ground he told his brother to call 9-1-1, but he did not try to help Taft. He saw his girlfriend and said, "Let's go." They walked to her car. He did not remember talking to any of the neighbors. As his girlfriend drove him to her house, he opened the door to be sick. He did not discard the gun. He cried when they arrived at her apartment.

II. *Attempted Murder Of Robert Alvarez*

A. *Prosecution Case*

On April 24, 1999, at 12:21 a.m., Sheriff's Deputy David Reed responded to a reported shooting on Glennlock Street in San Pablo. He found the victim, Robert Alvarez, lying on a couch, bleeding from a gunshot wound in his chest. Alvarez told Reed he had been shot while standing in front of the house. Reed found a freshly fired bullet in the street, but no weapons on Alvarez.

Alvarez acknowledged at trial that he told Detectives Thakara and Weikel that he thought it was defendant who had shot him. He said the same to his mother the day after he was shot, although he did not recall doing so at the time of trial. He testified before the grand jury that defendant had shot him. Alvarez testified unwillingly at trial, fearing for his daughter's safety. He and defendant had been at a party at the shooting scene. Alvarez had been talking to defendant and a small group of people. About three minutes later, as he stood on the driveway, someone came up to him and shot him. Alvarez denied arguing with defendant over defendant's taunt that defendant's cousin Elias Ochoa had "stomped" him in the past. When read the transcript of his grand jury testimony to that effect, and to the effect that Alvarez had challenged defendant to a fight following the taunt, Alvarez claimed he did not recall his testimony. Alvarez acknowledged fighting with Ochoa in the past. He also acknowledged Ochoa's name coming up during his conversation with defendant at the party. He might have called Ochoa a "snitch" or a "punk," but did not recall defendant calling Alvarez a "scrap," or challenging him to a fight. Alvarez did not see who shot him because the shooter

approached from his blind side, it was dark, and the incident happened so fast. He never claimed the shooter wore a hat. He did not recall what kind of gun was used, and denied telling Detective Weikel it was a semiautomatic .25 or .32 caliber. He did not tell Weikel that appellant shot him. He did not believe he told the grand jury the gun was a small, black semiautomatic .32 caliber gun.

Alvarez had been a member of, and associated with members of, the "13" or "CSL" gang. He had committed crimes in the past. Specifically, he acknowledged three felonies as an adult and an assault with a deadly weapon as a juvenile. "CSL" stands for Central Side Logos [*sic*: Locos] in Richmond. The gang's enemies include the "14" gang, some of whose members are friends and relatives of defendant. Alvarez was wearing his gang's blue colors at the party. There were no "13's" at the party and there might have been associates of the "14" gang there. Alvarez told Deputy Reed he thought he had been shot by a member of the "14" gang. They were his enemies and he had engaged in acts of violence against them, for which he believed they would retaliate. He did not recall talking to the medical staff at the hospital, when he was high on morphine and codeine. He had drunk half a fifth of brandy that night and smoked a gram of marijuana.

Alvarez had known defendant for five to seven years. He knew his mother, sister and brother, and had stayed overnight at their house when defendant was not home. He had not seen defendant for about four years before the shooting. Alvarez denied challenging defendant to a fight, insulting him, or taunting him about having had sex with his cousin.

Alvarez's mother recalled going to the hospital and talking to her son about what had happened. He told her that after he had argued with defendant at a party, defendant returned with a gun and shot him. He named defendant, calling him Nick Salcido, but she did not recognize the name at the time. Alvarez was "talking good" and "very aware." He did not seem to be affected by any medication and he was clear minded. Alvarez repeated the same information the following day, when his mother visited him

again. Alvarez later told his mother that he did not want to testify. He did not want to be labeled a snitch if he ever had to go back to jail.

Alvarez's half brother, Alex Rives, had accompanied him to the party and was with Alvarez when he was shot. As they stood outside the house, Rives was drinking with some of his friends. Hearing a commotion, he then heard a shot and saw Alvarez stumble. Rives grabbed him and took him inside. Rives took off his shirt, put it on Alvarez's wound, and called 9-1-1.

Rives testified that he did not see who shot Alvarez, and did not recall seeing defendant at the party. He did not recall telling Detective Thakara that defendant shot Alvarez, that he saw defendant and Alvarez argue, that defendant called Alvarez a "scrap", or that he saw Alvarez challenge defendant to a fight. Rives denied telling Thakara that he saw defendant pull a small handgun from his waistband, say "Fuck you," and immediately fire the weapon. Rives initially did not remember talking to Sergeant Weikel, then acknowledged telling Weikel that he had seen defendant talking to Alvarez at the party. But he did not recall saying he saw them arguing, that he heard either man call the other a "scrap", or that Alvarez challenged defendant to fight. Rives did not recall telling Weikel that he saw defendant talk to his brother Jessie on the porch, that he heard defendant say, "I'm not going to fight him," that he then heard a clicking sound and told Alvarez that defendant had a gun, or that Alvarez replied "I don't care" just before defendant shot him. Rives did not recall telling Weikel that he had seen defendant about a foot away from Alvarez and the gun might even have been touching Alvarez. He did not recall saying that the gun was small with a clip, like a Tech 22.

Rives acknowledged telling the grand jury that he knew defendant and saw him shoot Alvarez. He remembered testifying that he saw Alvarez and defendant talking, but did not recall saying that he saw them arguing. He did not recall the grand jury asking what they were arguing about and giving the following answer: "My brother had called his friend a snitch or something. And he said: Fuck you, scrap. And then my brother said: Look, you want to fight or something? Then [defendant] walked to the porch and turned around with his brother, and I was watching him from the side. [Alvarez] walked

back down towards the street and [defendant] said: I'm not going to fight, I'm going to shoot. And I heard him cock a gun, and I said: [Alvarez] he's got a gun. And [Alvarez] said: I don't care. And [defendant] walked up and shot him." He did not recall telling the grand jury that the gun was a small semiautomatic and that he saw defendant cock it. Rives did not recall telling the grand jury that he saw defendant walk up to Alvarez, raise the gun and fire it at extremely close range.

On cross-examination, Rives said he did not recall how much he had been drinking and had lied to the grand jury when he testified that he had consumed only two beers. However, he was not intoxicated at the party, although Alvarez was. He acknowledged seeing Alvarez and defendant talking, but denied that he saw defendant walk away from an argument with Alvarez. He heard but did not see the shot, and did not recall the events very well because he had been drinking. Rives had seen Alvarez get shot twice before.

Detective Thakara testified about his interview with Alvarez at his home five days after the shooting. Alvarez said he had confronted defendant over a fight Alvarez had with defendant's cousin, Elias, two years earlier. Defendant called Alvarez a "scrap," challenged him to fight, and then shot him from about a foot away. Alvarez spoke without difficulty and seemed unaffected by medication. His girlfriend was present during the unrecorded interview. The next day Thakara spoke with Alex Rives on the phone, asking him whether he saw Alvarez get shot. Rives, after conferring with Alvarez, said he and Alvarez were standing at opposite ends of a truck parked in the driveway of the house when defendant approached, argued with Alvarez and shot him. Rives recalled hearing defendant call Alvarez a "scrap," and heard Alvarez challenge defendant to a fight in response. Defendant then said, "Fuck you," pulled a small handgun from his waistband, and shot Alvarez.

B. *Defense Case*

Deputy Reed was one of the first officers to arrive at the scene. He removed a towel from Alvarez's wound and saw a single gunshot wound to the upper chest. Alvarez said he did not know who shot him. He said he had been standing in front of the house

when a Hispanic male ran up and shot him. When asked to provide a description of the shooter, Alvarez said he was dressed in black. Alvarez acknowledged being a member of the "13" gang and said he thought the shooting was probably gang related. He was evasive about where he had been standing, and was generally uncooperative. His medical condition did not wholly account for his vague and uncooperative demeanor.

Curtis Carr was defendant's good friend, and friendly with others in the Salcido family. Carr was also a friend of the Knight brothers who had hosted the party. Carr "kind of thought" he was probably at the party when someone was shot, but did not hear about the shooting until two weeks later. If that was the party he attended, he recalled seeing defendant, Jessie, and Alex Rives there. Defendant approached Carr and said he wanted to leave because he felt uncomfortable. Carr drove defendant, who was wearing a hat and jersey shirt, to his home in Crockett. Carr had not heard any unusually loud noises, arguments or gunshots at the party. After driving defendant home, Carr stayed with him for the next three to four hours and did not return to the party. Defendant was not drunk. Carr did not know Alvarez, had never met or seen him before, and did not see him at the party.

Dr. Raveendra Nadaraja, a cardio-thoracic surgeon, treated Alvarez at the Eden Trauma Center. His report contains the sentence "The patient does not know who shot him," but Dr. Nadaraja did not recall on what information he based that statement. He could have learned it from Alvarez, from a paramedic, or from some other person who transported the patient via helicopter. The report describes two thoracic wounds that were not necessarily connected and states that Alvarez heard three shots. When admitted, but before receiving any medication, Alvarez was quite rational and oriented. His injury was a serious one. He was examined and treated in the trauma room for one or two hours.

Defendant testified that he was living at his mother's home, and had attended two or three parties at the Knight residence in San Pablo. On the night of the shooting, he went to his grandmother's house in El Sobrante, where his father and cousin Alex lived.

Alex and Jessie invited defendant to accompany them to the party at the Knight's house. They let him borrow some clothes to wear, including a light jersey and hat.

At the party, defendant encountered Alvarez, whom he knew because Alvarez was dating Lori, his cousin's roommate. Alvarez was wearing a blue shirt, which signified he was a "13" gang member and probably had friends at the party. Alvarez "caught" defendant as he passed him to use the bathroom, and tried to offend him by talking "nasty" about Lori. Defendant tried to "escape," walking outside and down the driveway. Alvarez followed and made him face him. He said, "Tell your cousin next time you see her . . . I want to fuck her again next time I see her." He stopped and then said, "Oh, and your cousin Elias' brother, that's cool that they killed him and we didn't have to. Your boy Elias is a snitch." Alvarez then described how he had beat Elias up. Defendant contradicted Alvarez, saying that it was Elias who beat Alvarez up. He denied calling him a "scrap." Alvarez became enraged and started coming at him. When people grabbed Alvarez, defendant walked quickly into the back yard. He looked for Jessie and Alex but could not find them. He wanted to leave so he would not have to fight with Alvarez. Defendant's friend Curtis Carr volunteered to take him home. They walked to Carr's van parked down the street from the house, and Carr drove home to Crockett. Defendant did not hear a gunshot at the party, and he did not shoot Alvarez.

III. *Procedural History*

A May 2000 information charged defendant with murdering Taft, using and discharging a firearm, and causing great bodily injury. An August 2000 indictment charged him with attempting to murder Alvarez, using and discharging a firearm, and personally inflicting great bodily injury. The two cases were consolidated in October 2000. The defense motion to dismiss the indictment was denied in February 2001, and appellant's petition for writ of prohibition was denied in March 2001 by Division Four of this court. Appellant's motion to sever the two counts was denied on July 16, 2001, and jury selection began the following day.

The jury began its deliberations on August 1, 2001. The next day, after learning that the jury was deadlocked on the degree of the Taft murder, the court granted the

People's motion to dismiss the first degree allegation and substitute a second degree allegation. After further deliberations, the jury found appellant guilty of second degree murder, finding true the accompanying firearm use allegations. The jury also informed the court it was hopelessly deadlocked on the attempted murder count, and a mistrial was declared.

Appellant was sentenced to 15 years to life for second degree murder, enhanced with a 25-year term for personal discharge of a firearm causing death. Imposition of sentence on the other two use enhancements was stayed, and appellant received 785 days in presentence credits. This timely appeal followed.

DISCUSSION

I. *Denial of Severance Motion*

Defendant challenges the denial of his motion to sever the Taft case from the Alvarez allegations. He contends the joinder of the two charges suggested he was a person of violent character, and allowed the prosecution to join the weaker Alvarez case with the stronger Taft case. Thus, the jury heard inflammatory gang testimony, which would not have been admitted in a separate trial of the Taft case. Finally, if separate trials had been ordered, he contends none of the evidence from either case could have been admitted in the trial of the other. These arguments are not persuasive.

Defendant does not dispute that the statutory requirements for joinder were met here because both incidents involved the same class of crimes. (See *People v. Osband* (1996) 13 Cal.4th 622, 666.) Thus the burden was on him to establish that a substantial danger of prejudice required separate trials. (*Ibid*.) We review the trial court's ruling for an abuse of discretion, judged by the information available to the court at the time the motion was decided. (*Id*. at pp. 666-667.) If the ruling was correct when made, reversal will lie only "if defendant shows that joinder actually resulted in 'gross unfairness,' amounting to a denial of due process. [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 127.)

"When exercising its discretion, the [trial] court must balance the potential prejudice of joinder against the state's strong interest in the efficiency of a joint trial.

[Citation.]" (*Arias*, *supra*, 13 Cal.4th at p. 126.) "Because of the factors favoring joinder, a party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial. [Citation.]" (*Id*. at p. 127.)

"Cross-admissibility suffices to negate prejudice, but it is not needed for that purpose." (*Osband*, *supra*, 13 Cal.4th at p. 667; see also Pen. Code, § 954.1.) "In determining potential prejudice from the joint trial of non-cross-admissible charges, the court should evaluate whether (1) certain of the charges are unduly inflammatory, (2) a 'weak' case will be unfairly bolstered by its joinder with other charges, and (3) any of the charges carries the death penalty. [Citations.]" (*Arias*, *supra*, 13 Cal.4th at p. 127.)

The fact that the jury failed to convict defendant on the Alvarez charge, and convicted him of second degree rather than first degree murder on the Taft charge, demonstrates that the jury was able to evaluate the evidence and the charges separately. (See *People v. Stewart* (1985) 165 Cal.App.3d 1050, 1057; see also *Park v. California* (9th Cir. 2000) 202 F.3d 1146, 1150 [jury's failure to convict on all counts demonstrated its ability to compartmentalize the evidence], distinguishing *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1085-1086 [defendant convicted of both charged murders], the case on which appellant principally relies.) The record also demonstrates that the evidence relating to the Alvarez shooting was not unduly inflammatory, and that the "weaker" attempted murder charge was not bolstered by the "stronger" murder charge.[2] Neither charge carried the death penalty. Even assuming arguendo that the evidence would not have been cross-admissible had the charges been severed, the trial court did not abuse its discretion in ruling that defendant failed to clearly establish a substantial danger of

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2 We note that no gang allegation enhancements were included with the Alvarez attempted murder charge, and there was evidence suggesting that the argument that preceded that shooting stemmed from the personal conflict between Alvarez and the defendant. We also note the prosecutor discounted the suggestion of gang involvement in his argument to the jury, emphasizing that "these two guys knew each other," after defense counsel had suggested the attack on Alvarez stemmed from his involvement in gang activity.

prejudice arising from their joinder.[3] (See *ibid*.; *Osband*, *supra*, 13 Cal.4th at p. 668.) Nor has defendant shown that joinder of the charges resulted in "gross unfairness" at trial, as the testimony of numerous witnesses supported the jury's finding that the Taft shooting was malicious rather than negligent or accidental. (See *Arias*, *supra*, 13 Cal.4th at p. 130.)

Next, defendant contends that even if the joinder was proper, the trial court erred in permitting the prosecution to argue that evidence pertaining to the Alvarez shooting should be considered as proof of defendant's intent in the Taft shooting.[4] The jury's failure to convict defendant on the Alvarez charge, however, along with its finding of second degree rather than first degree murder on the Taft charge, demonstrate that the jury did not accept the prosecutor's invitation to find express malice on that basis. Thus defendant has failed to show prejudice from the alleged error.

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3 In denying defendant's motion to sever, the trial court noted that defendant's intent, and whether the killing was accidental, were issues central to the Taft murder charge. The court concluded the attempted murder of Alvarez was sufficiently similar to permit the drawing of an inference regarding defendant's state of mind on the two occasions. The court noted that in both cases, the victim challenged the defendant to a fight, and the defendant responded by shooting him. Defendant now contends the situations were different because Taft was trying to prevent him from continuing an argument with a third party. We note, however, Taft's cousin testified that Taft had suggested they fight, and had taken off his glasses and put them aside, before defendant raised his gun and shot Taft in the face.

4 According to the portions of the record cited by defendant, the prosecutor argued: "Let me talk about those facts of that case, of which they are [*sic*] very similar to the murder of Harold Taft. An argument, a confrontation, a challenge to a fistfight, and the defendant settling the score with a handgun." The prosecutor also made the following statement, after discussing Alvarez's possible motivation to lie when telling his mother defendant had shot him: "You know, both of these cases truly boil down to which version of the facts you believe. Either the defendant is quite possibly the most unlucky guy in the world, he is falsely accused of the attempted murder and then, eight months later, shoots his best friend in the face by accident, or he is not telling you the truth here." In closing, the prosecutor reiterated that "somebody here is telling you the truth and somebody is being false, willfully false. . . . [¶] [Defense counsel] . . . said I was being insincere . . . about arguing about first degree. I'll stand here and tell you again that this is first degree. I will stand in front of you and say the preexisting reflection is this guy had a gun with him in the past, eight months earlier, a dry run, shoots Robert Alv[a]rez right in the chest. And I think he learned from that first encounter, he learned that you—if you want to kill somebody, you better shoot him in the face. If that's not preexisting reflection, I don't know what it is. [¶] The one thing that [defense counsel] said during the course of this trial that I believe is that his client's not afraid to fight. I wouldn't be afraid if I had a gun and I was willing to pull it out and shoot somebody. You'd have no reason to be afraid if you walked around like that. This is a textbook murder."

II. *Denial of Dismissal Motion*

Next, defendant contends the trial court should have granted his motion to dismiss the Alvarez indictment because the prosecution failed to disclose to the grand jury that Alvarez told the trauma surgeon he did not know who shot him. The jury's failure to convict on the Alvarez charge, however, together with defendant's failure to show prejudice from the joint trial, as discussed above, renders this argument moot. Defendant has also failed to show actual prejudice from the non-disclosure. The jury learned of that statement at trial. (See *People v. Towler* (1982) 31 Cal.3d 105, 123.)

III. *Alleged Instructional Errors*

Next, defendant contends that "even if it was lawful to permit the jury to consider the evidence of the Alvarez shooting as proof of [defendant's] intent, it was error for the trial court to fail to instruct . . . on the limited purpose for which the Alvarez evidence could be considered in the trial of the Taft shooting." Defendant neglects to acknowledge in his opening brief, however, that he failed to request such an instruction below. Nor did the trial court have a sua sponte duty to give such an instruction in the absence of a request.[5] (See *People v. Collie* (1981) 30 Cal.3d 43, 63; *People v. Humiston* (1993) 20 Cal.App.4th 460, 481.) Moreover, the record indicates the jury was able to compartmentalize the evidence relating to the two charges, demonstrating that the evidence relating to the Alvarez shooting did not "play such a dominant part in the case against the accused that it would be highly prejudicial without a limiting instruction." (See *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067.)

Next, defendant contends the trial court erred by instructing the jury using CALJIC 8.51, which draws a distinction between involuntary manslaughter and murder based on whether the act was criminally negligent or done with disregard of the danger to

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5 Defendant's claim in his reply brief that "[i]t must have been clear to the court, following the litigation of the motion for severance, that the problem the defense saw in the Alvarez evidence was the potential that the jury might use it as character or disposition evidence," is insufficient to impose such a sua sponte instructional obligation.

life.[6] According to defendant, the first sentence of the instruction could have resulted in an improper felony-murder conviction here, because assault with a deadly weapon may not serve as the predicate felony for a felony murder conviction under *People v. Ireland* (1969) 70 Cal.2d 522. The jury was not instructed on assault with a deadly weapon, however.[7] Neither was the jury instructed on the doctrine of felony murder, nor indeed on any other possible predicate felony. The court's other instructions to the jury made it clear that second degree murder required a showing of malice. Thus the case was not submitted to the jury on a felony murder theory, and appellant's speculative argument, based on this supposition, must fail.

Next, defendant contends his federal constitutional rights were violated when the trial judge instructed the jury using CALJIC 17.41.1. As defendant recognizes, however, the California Supreme Court rejected such a challenge in *People v. Engelman* (2002) 28 Cal.4th 436.

Finally, defendant contends the definition of reasonable doubt contained in CALJIC 2.90 deprived him of due process and equal protection because it failed to properly specify the degree of certainty required for proof beyond a reasonable doubt.[8] Defendant maintains that the instruction is based on Supreme Court dicta rather than a

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6 The court gave CALJIC No. 8.51 as follows: "If a person causes another's death while committing a felony which is dangerous to human life, the crime is murder. If a person causes another's death while committing a misdemeanor or infraction which is dangerous to human life under the circumstances of its commission, the crime is involuntary manslaughter. [¶] There are many acts which are lawful but nevertheless endanger human life. If a person causes another's death by doing an act or engaging in a conduct in a criminally negligent manner, without realizing the risk involved, he is guilty of involuntary manslaughter. If, on the other hand, the person realized the risk and acted in total disregard of the danger to life involved, malice is implied, and the crime is murder."

7 Nor could the prosecutor's passing reference to assault with a deadly weapon as a felony, as discussed below, reasonably have induced the jury to import such a concept into their deliberations. We also note the trial court included the following instruction to the jury: "If anything concerning the law said by the attorneys in their arguments or at any other time during the course of this trial conflicts with my instructions of law, you must follow my instructions." The court further reminded the jury, following the arguments: "If any of the arguments contain statement of law that are different than my instructions of law, either side, you will follow my instructions of law and not what was otherwise indicated."

8 CALJIC No. 2.90 was given as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to a verdict of not guilty. This presumption places upon the People the

holding, and that its validity therefore remains an open question. Defendant's argument has been consistently rejected, however, by every appellate district in California, as well as the Ninth Circuit Court of Appeals. (*People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286-1287.) Nor are we persuaded by defendant's attempt to analogize his equal protection claim to the legislative standard governing the intent of voters discussed in *Bush v. Gore* (2000) 531 U.S. 98. The defendant's own brief indicates that the statement on which he relies, regarding the implications of that decision for criminal law, is taken from the dissent.

IV. *Alleged Prosecutorial Misconduct*

Defendant contends the cumulative effect of the prosecutor's improper comments during argument requires reversal of his conviction. First, he contends the prosecutor personally attacked defense counsel at the start of his rebuttal argument, by commenting on defense counsel's years of experience and expressing the hope that one day he could be "half as good as [defense counsel] is in closing arguments in telling a story." The prosecutor's reference to this well-respected advocacy technique did not insinuate that counsel's arguments were fabricated. The prosecutor continued by discounting counsel's argument that the defendant was a good person, pointing out that the defendant had not put on any character witnesses, and commenting: "Remember, we're both advocates. His job is to get his client off the hook. That's why he gets paid." The court sustained counsel's objection to this remark, admonishing the prosecutor: "Let's stick to the facts." Thus any possible prejudice was cured when the objection was sustained. The comment did not deprive defendant of a fair trial under the circumstances presented here.

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burden of proving him or her guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." In response to criticism of the term "moral" in *Victor v. Nebraska* (1994) 511 U.S. 1, the California Supreme Court suggested in *People v. Freeman* (1994) 8 Cal.4th 450, 502-504 that the phrases "depending on moral evidence" and "to a moral certainty," previously included in CALJIC 2.90, would be better deleted from the instruction.

Defendant argues the prosecutor referred to facts not in evidence. He did not, we note, object to these remarks below.[9] In response to defendant's argument that Taft was his friend whom he had no motive to shoot, the prosecutor stated: "But we all know from everyday experience husbands kill wives and vice-versa. Brothers kill brothers. Friends kill friends. Homicide is a crime that involves passion and anger. And you all know from your common experience that probably the people you've gotten the most angry in your life with are relatives, are friends, are loved ones. . . . [¶] . . . So although that evidence has been put out there before you, that friends couldn't do this to each other, we all know, using our common sense, that that's not the case. And in our country, most homicide involves a victim who knows their assailant." These comments constituted fair reference to the jurors' everyday experience and common knowledge. (See *People v. Sassounian* (1986) 182 Cal.App.3d 361, 396; accord, *People v. Pitts* (1990) 223 Cal.App.3d 606, 704.)

Later, in reference to defendant's argument that the jury should consider his brandishing a weapon as the predicate misdemeanor for a finding of misdemeanor manslaughter, the prosecutor also stated: "I think we also talked about this concept of, oh, it's just a brandishing. It's just a 417. This is not just a misdemeanor. You'll be happy to know that when somebody sticks a loaded revolver we don't charge it as a 417. Assault with a deadly weapon. It's a felony." To the extent that this comment might have implied improper reference to the charging policies of the prosecutor's office, we conclude that any error was de minimis, and did not constitute "the use of deceptive or reprehensible methods to persuade . . . the jury." (*Price*, *supra*, 1 Cal.4th at p. 447.) The defendant suffered no prejudice from any or all of these arguments.

V. *Inability to Call a Defense Witness*

Defendant contends he was deprived of the crucial testimony of his girlfriend, Toni Dotson, who invoked her Fifth Amendment privilege when called as a witness. In

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9 Defendant's failure to object below also arguably waived these claims on appeal, as an admonition would presumably have cured any harm. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1215; *People v. Clair* (1992) 2 Cal.4th 629, 662; *People v. Price* (1991) 1 Cal.4th 324, 447.)

his motion for a new trial, defendant attached Dotson's declaration that she had declined to testify partly out of concern for her family's safety. If she had testified she would have stated, consistently with what she had stated to the police and in her preliminary hearing testimony, that when she and defendant left the scene of the Taft shooting, he asked her to turn around and take him back, but she refused to do so because she was afraid. Defendant maintains that Dotson's testimony was relevant to his state of mind when Taft was shot, and whether his departure should be interpreted as flight, implying consciousness of guilt.

Relying on *People v. Davis* (1973) 31 Cal.App.3d 106, defendant contends he was entitled to a new trial because he had been deprived of the testimony of a material witness through no fault of his own. In *Davis*, a subpoenaed defense witness failed to appear for trial. The defendant was convicted on the testimony of a police officer who testified the missing witness had introduced him to the defendant, who sold the officer heroin. (*Id*. at p. 108.) The defendant denied ever meeting the officer. (*Id*. at p. 109.) The missing witness had given a statement to defense counsel corroborating the defendant's testimony and swearing that neither he nor the defendant had participated in the heroin transaction described by the officer. (*Id*. at pp. 108-109.) Following a People's appeal, the court upheld the trial court's grant of a new trial. (*Id*. at pp. 110-111.)

In defendant's case, by contrast, the trial court exercised its discretion to deny the new trial motion. (*People v. Seaton* (2001) 26 Cal.4th 598, 693.) In rejecting defendant's arguments, the court noted that Dotson's testimony at the preliminary hearing had been read to the jury, and did not include "this comment about the defendant asking to be taken back and she refused to do so." The court concluded that the absence of that testimony was not sufficiently material to deprive defendant of a fair trial. Defendant has not overcome the strong presumption that the trial court's discretion was properly exercised here. (*Ibid*.) We also note the potential impact of the alleged missing testimony was significantly less powerful than the missing testimony in *Davis*, *supra*.

DISPOSITION

The judgment is affirmed.

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Corrigan, J.

We concur:

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McGuiness, P.J.

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Parrilli, J.